LIBRARY
SUPREME COURT, U. S.

FILED
AUG 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ Term, 19____

No. 74-146

WILLIAM P. CATENA, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANLEY W. GREENFIELD, ESQ.
GREENFIELD & MINSKY,
Counsel for Petitioner,
412 Carlton House,
Pittsburgh, Pennsylvania 15219,
(412) 281-8801.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON---SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	8
Appendix:	
Opinion from the United States District Court for the Western District of Pennsylvania, Dated December 4, 1973	9
Opinion of the Third Circuit Court of Appeals, Filed July 22, 1974	14

CITATIONS.

CASES.

Miranda v. Arizona, 384 U.S. 346 (1966)	8
Simon v. Lettiere, 257 Mass. 563, 154 NE 84 (1926)	7

STATUTES.

18 U.S.C. § 6	4
18 U.S.C. 2(b)	5
18 U.S.C. 287	2, 3, 4, 5
18 U.S.C. 1001	4, 5, 6
28 U.S.C. 1254(1)	2
42 U.S.C. 1395(u)	3

IN THE

Supreme Court of the United States

_____ Term, 19____

No. _____

WILLIAM P. CATENA, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on July 22, 1974, which affirmed the District Court's denial of Petitioner's Motion for a New Trial.

Opinions Below

The District Court for the Western District of Pennsylvania denied Petitioner's Motion for New Trial by opinion (Appendix pp. 9-13). The Third Circuit Court of Appeals affirmed by opinion (Appendix pp. 14-29).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

I. Was Petitioner properly convicted of submitting a claim to an Agency of the United States in violation of 18 U.S.C. 287 where:

1. The Circuit Court held that Blue Shield and Travelers Insurance Companies, to which the claims were submitted, were not federal agencies as the government had attempted to prove at trial in support of the indictment;

2. The District Court charged on the same theory;

3. The Circuit Court held that the District Court erroneously charged the jury in the language of 18 U.S.C. 1001, a statute more broadly providing for violations as to matters within the jurisdiction of the United States, unlike 18 U.S.C. 287, which provides for submission of claims directly to an Agency of the United States.

II. Was it in derogation of Petitioner's right to due process for statements signed by Petitioner's then counsel prior to trial to be received in evidence against Petitioner as his own admission.

Statement

Petitioner is a physician in the general practice of medicine for over twenty years in the Pittsburgh area. He was indicted in 141 counts for submitted false claims to an Agency of the United States in violation of 18 U.S.C. 287. Of those, 114 counts were submitted to the jury and the Petitioner was eventually convicted of 10 of these. The claims for patient treatment were submitted to Blue Shield or the Travelers Insurance Company, which by contract with the Secretary of Health, Education, and Welfare administered benefit provisions of the Medicare Act under 42 U.S.C. 1395(u). The evidence showed that the Petitioner was a one-man operation, assisted by an unschooled nurse-clerk type who kept his patient records. On three occasions during the indictment period, it was stipulated that the Petitioner was absent from his office for the purpose of returning one or the other of his two sons to medical school in Mexico. It was during these periods that the Petitioner's records, voluntarily furnished to the Government, reflected billings for the treatment of patients. The gravaman of the indictment was that such claims were improper as the doctor himself could obviously not have rendered treatment. Petitioner claimed that the recordation of treatment was either the result of inaccurate bookkeeping by his nurse-clerk, or represented treatment in fact rendered by the nurse and at least one of the sons, a third year medical student, under standing instructions previously given by the doctor. If true, such treatment would be compensable under the Medicare Act as a physician service. After conviction and his Motion for New Trial and Arrest of Judgment was denied, Defendant was sentenced to incarceration for sixty (60) days and was fined $1,000.00 on each count, for a total of $10,000.00. The Third Circuit affirmed on appeal even as it was holding that

the Government's theory of the case was wrong, the District Court's instruction was in part in error, and that Agencies of the United States within the meaning of 18 U.S.C. 287 did not include those to which the Petitioner submitted his claim. This Petition for a Writ of Certiorari followed.

Reasons for Granting the Writ

I.

On the basis of the Government's evidence and the Trial Court's charge, the Defendant was convicted of a crime for which he was not indicted and that conviction affirmed on a theory on which he was not tried. Defendant was convicted of filing false claims in violation of 18 U.S.C. 287. That Section provides:

> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claims to be false, fictitious or fraudulent . . ." commits an offense against the United States.

A companion Statute, 18 U.S.C. Section 1001, on the other hand, provides as follows:

> "Whoever, in any matter *within the jurisdiction of any department or agency* of the United States knowingly and willfully falsifies, conceals or covers up by any trick . . . or makes any false, fictitious or fraudulent statements . . ." is guilty of an offense against the United States. (emphasis ours)

Agency is defined in 18 U.S.C. § 6 as and including:

> "Any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the

United States has a propriety interest, unless the context says that such term was intended to be used in a more limited sense."

The Government's proof in the instant matter related to claims made to Blue Shield and Travelers Insurance Companies which it was stipulated were independent carriers having a contract with HEW.

The Third Circuit agreed with Petitioner's contentions:

1. That within the meaning of 18 U.S.C. 287 Blue Shield and Travelers were *not* Agencies of the United States (Circuit Court Opinion, p. 3, Appendix, pp. 16, 17); and

2. That the District Court's charge to the jury in the language of 18 U.S.C. 1001, *e.g.*, the offense "is an act or acts of making and using or causing to be made a false writing or document, a claim to a *matter within the jurisdiction of the United States*", was objectionable as being actual language culled from 18 U.S.C. 1001, not § 287 with which Petitioner was charged (Circuit Court Opinion, p. 7, footnote 8, Appendix p. 21).

Nevertheless the Circuit concluded that Petitioner could remain convicted because the indictment charged that he had caused claims to be submitted to an agency of the U.S., presumably HEW, this despite the absence of any statutory reference to 18 U.S.C. 2(b).

Indeed the Circuit concedes, as it must, that it was affirming Petitioner's conviction on a theory other than that relied upon by the Government and the Trial Court (Circuit Court Opinion, p. 6, footnote 7, Appendix p. 20).

The indictment specifically charged Petitioner with making false claims to an agency of the United States (Circuit Court Opinion, p. 2, Appendix p. 15). The Government's

proof throughout trial and the Court's charge patently contemplated Travelers and Blue Shield as *the agencies of the U.S.* referred to in the indictment. Indisputable facts obviously prompted the Circuit Court to substitute its own theory of prosecution.

If the indictment had specified HEW as the Government Agency indicated or if the Government's proof were to that effect, then, concededly, submission of a claim through an intermediary would nevertheless be causing said claim to be filed with the United States.

The Circuit, however, rewrote the indictment, substituted an alternate theory of prosecution never mentioned at trial, ignored the Government's insistence that Travelers and Blue Shield were the agencies of the United States intended to be described by the indictment, and then countenanced the District Court's charge in the language of another statute, *i.e.*, 18 U.S.C. 1001.

There was no evidence that the claims were submitted anywhere than to Blue Shield and Travelers. While it is true that federal funds were used to reimburse these companies, that we think irrelevant, given the language of the indictment and the theory of the prosecution. Hence the Circuit's reliance on the causing to be submitted theory is plainly misplaced as it is patently evident that the language of the indictment, the instruction of the Court, and the theory of prosecution of the Government all intended to mean Blue Shield and Travelers as the agency to which it was that the Defendant was supposed to have submitted his false claims.

If the jury believed as the prosecution, District Court and indictment all suggested, that it was Travelers and Blue Shield that were the federal agencies to which claims

were being made and that Petitioner's causing said claims to be submitted to those agencies was the gravaman of the indictment, as it apparently did, then Petitioner was convicted for a non crime, the Circuit having held that Travelers and Blue Shield were not agencies of the United States.

II.

During the investigation of the charges giving rise to the indictment, but before it, Petitioner, in the presence of his then counsel, met with Blue Shield investigators. He was presented at that time with a form which gave Miranda warnings and provided that any statement made by the Petitioner could be used in a criminal proceeding against him. Moreover it provided that the person signing knew that "for the purposes of the review, I may, if I choose to do so, make a statement explaining the circumstances surrounding the iregularity" (Circuit Court Opinion, p. 13, footnote 14, Appendix p. 28). Before the Petitioner could acknowledge an understanding of the form or affix his signature, it was seized from his hands by his then counsel who wrote on it "there is no irregularity", signed his own name, and handed the form back to the investigator. At trial the Government offered evidence of this fact as a tacit admission by the Defendant that there were no irregularities when, in fact, the Government's evidence was demonstrating that there had been significant irregularities. We are aware of authority to the effect that under proper circumstances, counsel may be deemed to be the agent of his client for purposes of admissions, but only where it is apparent that counsel is authorized to appear and make full representations with respect to the subject of an inquiry. *Simon v. Lettiere,* 257 Mass. 563, 154 NE 84 (1926).

Neither Petitioner nor the Government on appeal was able to find any criminal case where counsel's statements were held to be admissions of an otherwise silent Defendant, particularly when counsel's statements are made before it is even determined that the Petitioner knew his rights, much less waived them as he was being asked to do with the form presented to him in the instant matter. Clearly, the sudden seizure of the paper by Petitioner's counsel was an unanticipated act and we think manifestly unauthorized conduct as to which the doctor had no reason to give his approval. Such conduct could neither have been foreseen nor authorized. Moreover, as it will be remembered that the form was tendered with respect to whether the doctor understood his Miranda rights, we think it apparent that the Government did not meet its heavy burden of showing a waiver of fundamental rights. *Miranda v. Arizona,* 384 U.S. 346 (1966). We take it that a defendant in open court could not be bound by conduct of his counsel for purposes of a plea of guilty or a waiver of a jury trial without his own acknowledgment. That acknowledgment was entirely absent here.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted

STANLEY W. GREENFIELD,
Attorney for Petitioner.

APPENDIX

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

WILLIAM P. CATENA.

Criminal Action No. 72-216.

WEBER, *J.* December 4, 1973

Defendant was originally indicted in an indictment of 141 counts for submitting false claims to an agency of the United States under 18 U.S.C. 278. The case went to trial on 11 of those counts, the remainder being dismissed. The defendant is a physician and the claims in question were submitted to Blue Shield or Traveler's Insurance Company which by contract with the Secretary of Health, Education and Welfare administer the benefit provisions of the Medicare Act, 42 U.S.C. 1395(u). The jury returned a verdict of guilty under 10 counts of the indictment and we have now before us a motion for judgment of acquittal or for new trial.

The first ground of defendant's motion and one which was alleged before trial is that the statute requires that the claim be submitted to an "agency" of the United States,

and that Blue Shield and Traveler's Insurance Company do not fall within the definition of "agency" as defined in 28 U.S.C. 451, and 18 U.S.C. § 6. This question has been before the Court of Appeals in this Circuit in *United States v. Waters,* 457 F.2d 805 [3rd Cir. 1972] under a parallel statute [18 U.S.C. 1001] which proscribes the making of a false statement in a matter "within the jurisdiction of a department or agency" of the United States, where the claim was made by the defendant to a contractor of the Department of Labor and not to the Government itself. The Court of Appeals found the distinction to be without merit.

In *United States ex rel. Marcus v. Hess,* 317 U.S. 537 [1942], it was argued that the defendants entered into contracts with local government units rather than the United States Government and therefore had not defrauded the United States Government. These contracts related to construction projects, a substantial portion of which were funded by the United States Government. The Supreme Court found that the essence of the offense was defrauding the Government of the United States and that it was immaterial what bookkeeping devices were used by the Government in the distribution of these funds. In *United States v. Reifert,* 390 U. S. 228 [1967], the Supreme Court held that the False Claims Act should reach "all fraudulent attempts to cause the Government to pay out sums of money" (p. 233).

We, therefore, conclude that Blue Shield and Traveler's Insurance Company are acting as agents for the Secretary of Health, Education and Welfare in administering the Medicare Program.

The remainder of defendant's grounds for new trial concern the conduct of the trial itself. Defendant complains of the refusal of the court to sever the counts for separate trial because the cumulative effect of evidence with respect to all of the counts created a highly prejudicial atmosphere at trial. The court, in fact, prior to the opening of the trial attempted to reduce the number of counts which would be presented by requiring the United States to classify the counts into categories in accordance with the nature of the evidence to be presented, and in consequence the United States dismissed about 30 counts. All of the counts presented a related series of transactions by the same persons under similar circumstances and were properly presented to the jury for its consideration. All of the counts depended upon the same set of office records of the defendant and were properly presented in a single trial.

Defendant alleges that testimony of a statement of defendant's then attorney, made at the time when defendant was confronted by representatives of Blue Shield and the Bureau of Health Insurance when the defendant was advised of the nature of the investigation and of his Miranda rights, was improperly admitted into evidence to the prejudice of defendant. When the defendant was offered an acknowledgment form for his signature to evidence the fact that he had been so advised his then attorney wrote on the acknowledgment form "there are no irregularities." It is argued that the admission of this statement by his attorney made in his presence at this time constitutes an improper reflection or comment on the failure of the defendant to respond to the inquiry at that time and is thus an invasion of his constitutional right to remain silent. [The defendant did take the witness stand at trial and admitted

that there were "irregularities" in his office records, without criminal intent]. However, this is a statement made by the defendant's own attorney in his presence and with his knowledge for which defendant stands responsible and which was properly admitted in evidence against him.

Counsel argues that he is deprived of the right of trial by a jury of his peers because physicians are systematically excluded from jury service. There were no physicians on the panel from which the trial jury in the instant case was drawn. The jury selection plan administered by this court does not exclude physicians from the selection process, but allows any physician to be excused on his request when he is engaged in the active practice of medicine. The defendant has no right to any particular composition of a jury but merely that the procedures provide a fair and representative cross-section from which the panel may be selected.

The final argument to be considered is whether or not the verdict was contrary to the weight of the evidence. The jury's verdict of guilty was made to those counts of the indictment which charged the defendant with submitting false claims for house calls made by him in his capacity as a physician. With respect to the house call counts the evidence was not only clear and convincing it was overwhelming. While the evidence as to the other counts raised some issue of reasonable doubt the jury evidently felt that there was no possibility of a reasonable doubt as to the fraudulent nature of the claims for house calls made during the period that the defendant was visiting in Mexico.

Opinion

Under all of the evidence presented the court finds no grounds to grant defendant's motion for judgment of acquittal or motion for new trial.

ORDER.

AND Now this 4th day of December, 1973, the Defendant's Motion for a Judgment of Acquittal or in the alternative for a New Trial is Denied.

GERALD J. WEBER,
United States District Judge.

cc: Richard L. Thornburgh, U. S. Attorney
633 U. S. Post Office & Courthouse
Pittsburgh, Pa. 15219

Stanley W. Greenfield, Esq.
412 Carlton House
Pittsburgh, Pa. 15219

H. David Rothman, Esq
1914 Frick Building
Pittsburgh, Pa. 15219

Edward F. Urbanik, Esq.
1212 Frick Building
Pittsburgh, Pa. 15219

Opinion of the Court

(Filed July 22, 1974.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1054

UNITED STATES OF AMERICA,

v.

WILLIAM P. CATENA, M. D.,

Appellant.

D. C. Crim. No. 72-216.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued May 29, 1974.

Before ROSENN and HUNTER, *Circuit Judges,* and HANNUM, *District Judge.*

Stanley W. Greenfield, Esquire, Greenfield & Minsky, Attorney for Appellant.

Richard L. Thornburgh, Esquire, David M. Curry, Esquire, Attorneys for Appellee.

ROSENN, *Circuit Judge.*

The defendant, a physician, was tried to a jury and convicted of ten counts of an indictment for fraudulently submitting false Medicare claims for payment. We affirm.

Each count of the indictment upon which the defendant was convicted was in the following form:

> On or about [date], at Carnegie, in the County of Allegheny, in the Western District of Pennsylvania, defendant William P. Catena, M. D., presented and caused to be presented to an agency of the United States under the Health Insurance for the Aged Act, a claim against the United States for medical services supplied and rendered to [name and address of patient] for [number] house calls, on [dates of treatment], pursuant to the provisions of the Health Insurance for the Aged Act, knowing the said claim to be false, fictitious, and fraudulent in that no medical services were supplied and rendered by William P. Catena, M. D., to the said [name of patient] on said dates.
>
> In violation of Section 287 of Title 18, United States Code.

We first consider the question of whether the evidence most favorable to the Government shows acts which constitute violations of the statute under which the defendant was indicted and convicted.[1]

---

[1] Although the defendant has not directly raised this issue on appeal, we consider it on our own motion for three reasons. First, the defendant raised this issue in the district court, and raises a related issue on this appeal by his challenge to the court's charge to the jury, *see* pp. 21-25 *infra*. Second, as the Supreme Court has recently reiterated, "a claim that a conviction is based on a record lacking any evidence relevant to crucial elements of the offense is a claim with serious constitutional overtones," Anderson v. United States, 42 L.W. 4815, 4819 n.12 (U.S. June 4, 1974), and we believe, as did the Court in *Anderson*, that the "interests of justice" require its consideration here. In

(Footnote continued on following page)

18 U.S.C. § 287 makes illegal the fraudulent presentation of claims "to any person or officer in the civil . . . service of the United States, or to any department or agency thereof. . . ."[2] The evidence at trial indicated, however, that the defendant had submitted the allegedly fraudulent claims to Pennsylvania Blue Shield (Blue Shield) and to the Travelers Insurance Company (Travelers), rather than directly to any federal official or federal agency.

The Government tried the case on the theory that Blue Shield and Travelers were agencies of the United States within the meaning of § 287. The Government contended that the defendant, by submitting false claims to these private insurance carriers, had submitted false claims to agencies of the United States in violation of § 287. In support of this theory, the Government introduced at trial the contracts between federal agencies and each of the insurance carriers.[3] These contracts provided that the carriers

---

(Footnote continued from preceding page)
any event, the defendant, in reliance upon *Anderson*, could apparently raise the claim in a petition for certiorari from this court. We believe that our consideration of the issue at this point would possibly avoid a later remand. Finally, we are concerned that our failure to comment on the issue might be construed as approval of the district court's rationale for its disposition of the case.

[2] 18 U.S.C. § 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[3] One contract ran between Blue Shield and the Department of Health, Education, and Welfare. The other contract ran between Travelers and the Railroad Retirement Board.

would process and pay Medicare claims, in return for federal reimbursement for claims paid and for administration costs. The district court, in its opinion denying the defendant's post-trial motions, accepted the Government's theory that these reimbursement provisions made the insurance carriers agents of the United States.

We have considerable doubt that Blue Shield and Travelers may be considered "agencies" of the United States for purposes of the criminal prohibition of § 287, regardless of their contractual arrangements with the United States. 18 U.S.C. § 6 states that for purposes of Title 18,

> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

The final phrase of this definition indicates that the prior terms were intended as the *outer* limits of the definition of agency, and, given the criminal nature of the statute, it would be difficult to contend that private organizations with reimbursement contracts with the United States fell within any of the definitional terms.[4]

---

[4] The Reviser's Note to § 6 states that "[i]t was considered necessary to define clearly these words ["department" and "agency"] in order to avoid possible litigation as to the scope or coverage of a given section containing such words."

The district court relied in part upon United States v. Waters, 457 F.2d 805 (3d Cir. 1972). That case, however, was concerned with the provision of 18 U.S.C. § 1001, referring to "any matter within the jurisdiction of a department or agency of the United States." That statutory language is broader on its face than the language of § 287. The district court also relied upon United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1942), discussed *infra*.

We need not decide this question, however, because we believe that the indictment and proof were sufficient to sustain the conviction on the theory that the defendant "caused" the private insurance carriers themselves to submit his false claims to HEW and to the Railroad Retirement Board, which are clearly federal agencies.

In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1942), the Supreme Court was called upon to construe R.S. § 5438, the forerunner of § 287, which at the time began with the language

> Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil . . . service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent. . . .

In *Hess*, the Court held that when private contractors engaged in collusive bidding practices on contracts made with local governmental units, and when a large portion of the money paid the successful contractors by the state was of federal origin, then the contractors were "causing to be presented" a "claim upon or against the government." 317 U.S. at 544. Were the old version of the statute which was at issue in *Hess* presently in force, the defendant in the instant case could have been convicted of "causing" the innocent insurance carriers to present his fraudulent claims to the United States.

It may be contended, however, that the revised version of the statute, which refers to presenting false claims to an agency of the United States but not to *causing* false

claims to be presented, precludes conviction of the defendant on the theory of *Hess*. We do not believe that this conclusion would be correct. The "cause" language of the former version of § 287 has clearly been replaced by 18 U.S.C. § 2(b),[5] which states that

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Just as under the former version of § 287 at issue in *Hess*, under the combination of the present version of § 287 and the present § 2(b) a person may be guilty of causing a false claim to be presented to the United States even though he uses an innocent intermediary (in this case the insurance carriers) to actually pass on the claims to the United States. *See Periera v. United States*, 347 U.S. 1, 8-9 (1954).[6]

---

[5] The Reviser's Note to § 287 states that "[r]eference to persons causing or procuring was omitted as unnecessary in view of definition of 'principal' in section 2 of this title." The Reviser's Note to § 2 states that "Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as 'causes or procures'." This modification of language did not represent a substantive change in Title 18. *See* Pereira v. United States, 202 F.2d 830, 836-37 (5th Cir. 1953), *aff'd*, 347 U.S. 1 (1954).

[6] In *Pereira*, the defendant had deposited a fraudulently procured check drawn on a Los Angeles bank into his El Paso bank account. The innocent Texas bank mailed the check to California for collection. Citing § 2(b), the Court held that the defendant had been properly convicted for "causing" the check to be mailed across state lines. The Court stated that "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." 347 U.S. at 8-9. *Cf.* United States v. Maze, 414 U.S. 395, 399 (1974).

We further note that the indictment in this case was sufficient to sustain the conviction under this theory. The text of each count accused the defendant of "present[ing] and caus[ing] to be presented" a false claim to an agency of the United States. While the indictment did not by its terms refer specifically to § 2(b), but rather referred only to § 287, this omission is not fatal. *United States v. Koptik*, 300 F.2d 19, 22 (7th Cir.), *cert. denied*, 370 U.S. 957 (1962); *Londos v. United States*, 240 F.2d 1, 7 (5th Cir.), *cert. denied*, 353 U.S. 949 (1957). In terms of giving notice to the defendant of the crime for which he is charged, the bare citation of § 2(b) adds little to the specific language of the indictment charging him with "causing" a false claim to be submitted.[7]

Even though we have found that the evidence *most favorable to the Government* was sufficient to sustain the

---

[7] We find no prejudice to the defendant from our holding that the conviction can be affirmed on a theory other than that relied upon by the trial court and the Government. First, the defendant cannot claim a lack of opportunity to show that he did not "cause" the private carriers to submit his Medicare claims to the Government for reimbursement. He had full opportunity to explore the relationship between the carriers and the Government in order to support his contention at trial that the carriers were not agencies of the United States. This relationship was clearly shown by the reimbursemnt contracts between the carriers and the Government.

Moreover, it would have been futile for the defendant to contend at trial that he did not know that the claim forms he sent to the carriers would ultimately be paid out of the federal treasury. The forms each contained the heading, in large letters, "Request for Medicare Payment," and on the next line "Medical Insurance Benefits—Social Security Act." In the lower right hand corner was the notation, in small letters, "Department of Health, Education, and Welfare, Social Security Administration." In fact, the only indication that the form was not to be submitted directly to the Government was the address section, which listed "Medicare/Pennsylvania Blue Shield/Box 65/ Camp Hill, Pa. 17011."

defendant's conviction under § 287, this does not dispose of the defendant's contention concerning the court's charge to the jury on this "agency" issue. An improper charge by the trial court might have permitted the jury to convict the defendant on evidence which would be insufficient to constitute a violation of the statute.

The court charged the jury that

> There are two essential elements to this offense, and the Government must prove each of these elements beyond a reasonable doubt. . . . The elements—that is what constitutes this or the definition of the offense requires that there is an act or acts of making and using or causing to be made a false writing or document, a claim to a *matter within the jurisdiction of the United States.* One, is the claim false, and knowing that the claim is false and doing it knowingly and wilfully. [Emphasis supplied.][8]

The defendant, who did not object to the italicized portion of the charge at trial, now contends that it was error because it is broader than the literal requirement of § 287 that the claim be made to an agency of the United States. In view of 18 U.S.C. § 2(b), we need only compare the court's instructions on this point with the requirement that the defendant cause a false claim to be submitted to an agency of the United States.

We do not believe that the charge constitutes plain error requiring a reversal of the conviction.

---

[8] The trial court apparently based the italicized portion of the charge upon the actual language of 18 U.S.C. § 1001. *Cf.* United States v. Matanky, 482 F.2d 1319 (9th Cir.), *cert. denied,* 414 U.S. 1039 (1973).

We first note that

> In determining the effect of [the] instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the over-all charge.

Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). When so viewed, we do not believe the jury was misled by the superfluous reference to "a claim to a matter within the jurisdiction of the United States." The objectionable phrase was preceded at length by the trial court's description of the offense as charged in the indictment. This was followed by the trial court's reading of the statute upon which the indictment was predicated, § 287, and an explanation of the essential elements of the offense, including the act of "making . . . or causing to be made a false writing or document, *a claim to a matter within the jurisdiction of the United States.*" The objectionable but superfluous language italicized above was qualified by the following instruction:

> It is fraudulent if it is . . . made or caused to be made with the intent to deceive the Government agency to which it is submitted.

Looking at the charge as a whole, we do not believe that the jury was misled.

Even assuming, however, that the jury was influenced by the overly broad phrase in the instruction referring to "a matter within the jurisdiction of the United States," we believe that there is an alternative reason why the charge is not plain error. In *Anderson v. United States*, 42 L.W. 4815 (U.S. June 4, 1974), the defendants had been indicted

for conspiring to cast fictitious votes for federal, state, and local offices in a primary election, in violation of 18 U.S.C. § 241. The court's charge to the jury did not distinguish between the federal and state candidates who were on the election ballot, and indicated only that conspiracy to cast false votes in the primary election would constitute a violation of the statute. The defendants contended on appeal that § 241 reached only conspiracies to cast fraudulent votes for candidates for *federal* offices, and that their convictions should be reversed because the jury charge permitted a conviction if the jury found a conspiracy directed solely to *state* offices.

The Supreme Court found it unnecessary to reach the question of whether § 241 reached conspiracies to cast fraudulent votes for candidates for state offices, affirming the convictions even under the assumption that the statute only reached candidates for federal offices. The Court stated:

> While the District Court's jury instructions did not specifically focus upon the conspiracy to cast false votes for candidates for *federal* offices, no objection was made at trial or before the Court of Appeals with respect to this aspect of the instructions. See *Johnson v. United States*, 318 U.S. 189, 200 (1943); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). And, even assuming *arguendo* that § 241 is limited to conspiracies to cast false votes for candidates for federal offices, we could find no plain error here. The prosecution's case, as indicated earlier, showed a single conspiracy to cast entire slates of false votes. The defense consisted in large part of a challenge to the credibility of the Government's witnesses, primarily the three unindicted coconspirators. The case therefore ultimately hinged on whether the jury would believe or disbelieve their testimony. Given the record,

> we think it inconceivable that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without finding a conspiracy to cast false votes for the federal offices as well.

The principle of *Anderson* also applies to the instant case. Just as in *Anderson,* the defendant contends for the first time on appeal that the court's charge permitted the jury to convict on findings which in themselves would not constitute a violation of the statute. Just as did the Court in *Anderson,* however, we find it "inconceivable" that the error in the charge affected the outcome of the jury deliberations. The issue on the trial of these ten counts was the question of whether or not the defendant had fraudulent intent in submitting the claims for house calls for dates on which he concededly did not make the calls. The case turned entirely upon credibility, upon whether or not the jury would believe his testimony and that of his nurse/aide. No dispute existed over the factual nature of the relationship between the private insurance carriers and the federal government, and no such issue could possibly have arisen since the complete reimbursement contracts were introduced into evidence. The legal consequence of these relationships was for the trial court. We have held that the court could have properly submitted the case to the jury on the theory that the evidence was sufficient to show that the defendant caused a false claim to be presented to an agency of the United States. The jury by its conviction indicated that it found the claims at issue were fraudulent and related to matters which were "within the jurisdiction of the United States." We believe it "inconceivable" that the jury would not also have found that the defendant caused the fraudulent claims to be submitted to an agency of the United States.

The defendant next contends that the district court committed reversible error by denying his pre-trial motion, under Fed. Rule Crim. Proc. 14, to sever over 100 counts of the indictment and try them separately. The court ultimately dismissed 27 of the counts, submitting to the jury 114 of the 141 counts on which the defendant had been indicted.[9] As noted, the jury found him guilty on 10 of the remaining 114 counts.

The defendant claims that the court's refusal to sever was prejudicial because

> Permitting these over 100 counts to be submitted to the jury unnecessarily complicated the jury's consideration and was patently prejudicial to the defendant. Indeed, we suggest it is not the least bit unreasonable to suppose that absent these more than 100 counts, the likelihood of acquittal on the only 10 of which he was convicted would have been substantially enhanced. At least the possibility of a compromise verdict, as appears the likely result here, would have been dramatically reduced.

This court has consistently stated that denial of a severance by the trial court is not a ground for reversal absent an abuse of discretion by the trial court. Proof of such abuse of discretion requires affirmative evidence showing clear prejudice to the defendant. *See, e.g., United States*

---

[9] The defendant requested severance of over 100 counts which related to allegedly false claims for office visits listed on the claim forms as having been made on dates that he was concededly out of town. The jury acquitted him on each of these counts, apparently believing his defense that the services listed on the claim forms had been provided by his nurse/aide or by his medical student son.

The ten counts upon which he was convicted, on the other hand, were those counts which involved claims for *house calls* made on dates that he was admittedly out of town. His only defense to these counts was that the listed dates were bookkeeping errors.

v. Barber, 442 F.2d 517, 529 (3d Cir.), *cert. denied*, 404 U.S. 846 (1971); *United States v. Weber*, 437 F.2d 327, 332 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971). We see no abuse of discretion by the trial court on the facts of this case. All of the claims at issue were made in a similar manner, on identical forms and for similar services. The amount of money involved in each claim was almost nominal, averaging $10 per count.[10] The same office records of the defendant were required for each count, and the witnesses who would have been required for each trial included the defendant himself, his nurse/aide, and Blue Cross and Travelers personnel. Moreover, the period over which the alleged violations took place was reasonably limited,[11] and the stipulated fact upon which the Government primarily relied (that the defendant was out of the country or traveling on the dates that services were claimed to have been provided) was the same for each count.

We do not believe that on these facts the defendant was entitled to put the Government to the expense and inconvenience of separate trials.[12] Nor do we consider that the defendant's generalized fears of a compromise verdict have

---

[10] The 114 counts submitted to the jury represented allegedly fraudulent claims aggregating $1339; only 80% of such Medicare claims (after a $50 annual deductible per patient) were reimbursible.

[11] The periods covered were January 4-11, 1969; August 28-September 6, 1969; January 9-15, 1970; and July 2-10, 1970.

[12] *See* United States v. Abrams, 29 F.R.D. 178 (S.D. N.Y. 1961), denying motions for severance on 104-count indictment against six defendants. Although it is not clear how many of these counts actually went to the jury, the Court of Appeals ultimately affirmed the convictions of two defendants each convicted on the same seventeen counts, and one defendant convicted on a different seventeen counts. United States v. Abrams, 357 F.2d 539 (2d Cir.), *cert. denied*, 384 U.S. 1001 (1966).

sufficient basis to indicate that the refusal to sever was an abuse of discretion. We note that the trial court was careful to prevent confusion on the part of the jury as to which count was at issue at any given time; it plainly instructed the jury that each count was to be considered separately. The jury, likewise, was careful to convict only on those counts, interspersed throughout the indictment, relating to claims made for house calls.

We finally consider the defendant's contention that the trial court erroneously admitted into evidence a written statement made by the defendant's attorney in the presence of the defendant. During a HEW investigation of the charges giving rise to the indictment, but before the institution of any criminal proceedings, HEW and Blue Cross investigators met with the defendant and his attorney. After discussion of certain irregularities in the defendant's claims, the defendant was handed a Social Security Form SSA-1760 which, testimony at trial indicated, was "usually offered to people to give a voluntary statement to explain an irregularity." At the top of the form in large letters was the language "Voluntary Statement to Explain Irregularity." The defendant's name was filled in at the top of the form, and the blank space for the nature of the alleged irregularity read "billing for physician services under Medicare not rendered."[13] The form, which gave Miranda warnings and noted that any statement could be used in a criminal proceeding, stated that the signator knew that "[f]or purposes of the review, I may, if I choose to do

[13] An investigator had used the phrase "possible billing . . ." but had crossed out the word "possible" at the request of defendant's attorney.

so, make a statement explaining the circumstances surrounding the irregularity.[14]

The form was handed to the defendant. His lawyer, however, took the form from him and wrote on it "There is no irregularity," signed his own name, and handed the form back to the investigators.

We believe that the question of whether the statement by the attorney was properly admitted as an admission by the defendant depends upon whether the statement was made within the scope of the attorney's authority at the time it was made. *United States v. Dolleris,* 408 F.2d 918, 921 (6th Cir.), *cert. denied,* 385 U.S. 943 (1969). In this case it is clear that the attorney was acting within his authority in making the statement. The attorney took the form from the hands of the defendant and wrote on the form his statement denying irregularities. The defendant stood by and said nothing, implying that the attorney acted

[14] The form stated in full:

I understand that it is the policy of the Social Security Administration to require that all irregularities of the above nature be reviewed to determine whether there has been a violation of any penal provisions of the Social Security Act. (Where this review indicates there has been a violation, the file is referred to the Department of Justice for its consideration.) For purposes of the review I may, if I choose to do so, make a statement explaining the circumstances surrounding the irregularity.

I understand that this statement may be used against me in the trial of any criminal charges which the Government may bring regarding this matter. I further understand that I have the right to consult with a lawyer before giving any information or evidence and to have a lawyer present during any interview, and that I have the right to refuse to make any statement or to furnish any other evidence requested of me.

Understanding this, I hereby make the following statement voluntarily:

with his approval and consent. The defendant, who took the stand at trial, did not state that the attorney acted without his approval and consent. We therefore find no error by the trial court.

We find without merit defendant's additional contention that he was denied a jury of his peers because of the rule of court that physicians in active practice who are called for jury duty may be excused upon individual request.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

....., *Clerk of the United States Court of Appeals for the Third Circuit.*